and not its name. Goodwill and reputation would also depend on the period the tyres had been in the Malaysian market, the longer it is of course the better but since the plaintiffs had launched Aquatred only in October 1992 and their writ of summons had been filed on 23 June 1993, the period is a very short eight months, too short in the Court's opinion to establish any goodwill and reputation. None of the five requirements contained in *Pakai Industries Bhd. v. Chen Yew Industries Sdn. Bhd.* [1991] 2 CLJ 1574 namely -

(1) a misrepresentation;
(2) made by a trader in the course of trade;
(3) to prospective customers of his or ultimate consumers of goods or services supplied by him;
(4) which is calculated to injure the business or goodwill of another trade; and
(5) which causes actual damage to a business or goodwill of the trader by whom the action is brought.

have been proved in this case.

What is important, however, is that in practice when a customer wishes to purchase a tyre, whether or not with the central groove aqua design, he would normally ask for it by brand name, and if he wanted the tyre with the aqua design, he would of course quote the relevant name. The Court takes judicial notice that for all tyres, similar to the samples produced, both the brand name and the tyre name would be clearly imprinted on the tyres and no confusion would therefore arise as the customer would have chosen the brand first before deciding on the type of tyre he wants. With both the brand names and the tyre names on the tyres, a customer could hardly be confused by any similarity, if any, in the tread design. There is also no evidence that any one had been so confused. To grant the injunction would certainly give the plaintiffs an unfair monopoly of the tyre market for the aqua design.

It is also my view that the matter would be more properly dealt with at a full trial instead of merely on contentious affidavit evidence and an early trial, of course, would be more appropriate than the grant of the injunction to the plaintiffs pending the trial. As stated earlier, the plaintiffs' application is dismissed with costs as although there is a serious question to be tried, the balance of convenience lies in favour of the defendant.

GOVERNMENT OF MALAYSIA

v.

SARAWAK PROPERTIES SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[SUIT NO. KG. 61 OF 1992 (I)
4 OCTOBER 1993

REVENUE LAW: Proceeding by Government for recovery of taxes - Income Tax Act 1967 s.106(1) - Certificate of tax assessment by Director of Inland Revenue - Section 142(1) - Whether Certificate conclusive of the amount of tax due and payable - Whether Certificate open to challenge - Appeal against assessment - Whether allegation of incorrect assessment constituted appealable ground - Whether Court debarred from entertaining appeal - Section 106(3).

ESTOPPEL: Whether doctrine of estoppel applicable to Government in tax recovery cases - Whether representations made by Inland Revenue Officers to taxpayers in respect of non-liability of taxpayers to tax assessment bound the Government.

By a letter dated 20 June 1987 sent to the defendant, the Inland Revenue Department, Sarawak, (the department) told the defendant that the defendant was not liable to any tax in respect of the year of assessment 1986. This representation, however, was a mistake and on 4 November 1992 a Certificate of tax assessment was issued to the defendant by the department's Director pursuant to s. 142(1) of the Act in which a tax of RM7,035,353.60, which included tax assessment for the year 1986 amounting to RM5,461,730.88, was certified as being due and payable to the plaintiff. The import of s. 142(1) in this respect was that the statement in the said Certificate was deemed to be evidence of the fact stated therein unless the contrary is proved.

The defendant appealed against the assessment and raised two main objections,namely, that the tax sought to be recovered was incorrectly assessed and secondly, that by virtue of the representation made on 20 June 1987, the Government was estopped from claiming the tax in respect of the year of assessment 1986.

Held:

[1] In an action for recovery of tax under s. 106 of the Act, the Court is precluded from entertaining any plea that the amount of tax sought to be recovered is exessive, incorrectly assessed under appeal or incorrectly increased under s. 103(4),(5) or (5A). These points should be raised before the Special Commissioners and appeal could be lodged therefrom to question issues of law by requiring the Special Commissioners to state a case to the High Court.

[2] The doctrine of estoppel does not apply to Government on revenue matters. The Director of Inland Revenue and his subordinate officers down to those charged with the due administration of the Act are holding public offices and, in carrying out their tasks in assessing taxes under the Act, are performing public duties. Thus, despite issuing a letter such as the one issued to the defendant in this case, the officers cannot be estopped from subsequently exercising a power or discretion which it is their duty to exercise, though they are amenable to judicial review if they exceed or abuse their powers.

[3] The certificate of the Director of Inland Revenue issued under s. 142(1) of the Act is , by virtue of s. 106 of the Act, sufficient evidence of the amount of tax due and sufficient authority for the Court to give judgement for that amount and for execution to be levied.

[4] The letter dated 20 June 1987 has made no mention whatsoever of the matters raised in the Certificate. It therefore follows that the defendant has failed to discharge the burden of proving to the contrary evidence of the facts and matters as stated in the Certificate. The letter is thus insufficient to discharge the burden of displacing the statutory effect of the Certificate.

[5] The fact that the Revenue Department had adopted or accepted certain method in assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a different form of assessment.

[Appeal dismissed].

Cases referred to:

Sun Man Tobacco Co. Ltd. v. Government of Malaysia [1973] 2 MLJ 163 FC ***(foll)***

IRC v. Pearlberg [1953] 34 TC 57 CA ***(foll)***

Trustees of the Will of H.K. Brodie (deceased) v. Inland Revenue Commissioners [1933] 17 TC 432 ***(foll)***

Gresham Life Assurance Society v. AG [1916] 7 TC 36 ***(refd)***

R v. Inland Revenue Commissioners; ex p. Preston [1985] 2 AER 327 ***(refd)***

Liberty & Co. Ltd. v. The Commissioners of Inland Revenue [1924] 12 TC 630 ***(foll)***

Government of Malaysia v. DC [1973] 1 MLJ 161 ***(foll)***

Pethaperumal Chettiar v. C.I.T. [1943] 1 TR 532, 538 ***(cit)***

Patuck v. Llyod (Inspector of Taxes) [1944] 26 TC 284 at 292 CA ***(cit)***

Arumugam Pillai v. Government of Malaysia [1975] 2 MLJ 29 FC ***(cit)***

Legislation referred to:

Government Proceedings Act 1956, s. 42(2)(e)(i)

Income Tax Act 1967, ss. 103(4), (5), (5A), 106(1), (3), 134, 142(1), (2), Schedule 5, para 34

Rules of the High Court 1980, O. 14, O. 73 r. 4(1)

For the plaintiff - Abdul Karim bin Abdul Jalil, SFC
For the defendant - Kilat Beriak; M/s. Chew Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Chong Siew Fai J:

This is an appeal by the defendant, a limited company, against the decision of the learned Deputy Registrar granting summary judgment for the plaintiff, the Government of Malaysia in the sum of RM7,035,353.60, interest and costs.

The undisputed facts are short and simple. For the years of assessment 1986 and 1989, the defendant was assessed to income tax and development tax in the sums of RM5,461,730.88 and RM2,022,130 respectively. Notices of assessment dated 25 October 1988 and 30 January 1991 respectively for the said two sums were issued. Despite the denial in the defence, there is uncontroverted evidence, which I accept as the truth, that the said two notices of assessment were duly served on the defendant. Owing to the repeated failures of the defendant to pay the taxes in full within the permitted periods, a 10% increase of the unpaid tax and subsequently another 5% of the total balance unpaid (i.e. 5% of the aggregate sum of the unpaid tax and the 10% increase) were imposed in each case in accordance with s. 103(4) and s. 103(5A) of the Income Tax Act 1967 (the Act) respectively. With the two increases, the total amount

under the two notices of assessment is RM7,035,353.60 particulars whereof are as follows:

(i) Year of Assessment 1986:
Amount of tax RM5,461,730.88.

		Total
Less payment	RM1,381,730.88	
Balance	RM4,080,000.00	
10% increase	RM 408,000.00	
5% increase	RM 224,400.00	
		RM4,712,400.00

(ii) Year of Assessment 1989:
Amount of tax RM2,022,130.00.

Less payment	RM 10,914.75	
Balance	RM2,011,215.25	
10% increase	RM 201,121.52	
5% increase	RM 110,616.83	
		RM2,322,953.60
		RM7,035,353.60

As the amount RM7,035,353.60 was not paid, the plaintiff commenced this action claiming for the sum.

The defendant filed a defence and counterclaim. The counterclaim was for:

(a) a declaration that the plaintiffs' basis and/or principle of accounting is improper, wrong and erroneous in fact and in law in respect of the said development project;

(b) a declaration that the defendants' basis and/or principle of accounting is correct and proper in fact and in law with regard to the said development project.

By a summons-in-chambers dated 5 November 1992 the plaintiff applies for summary judgment in the sum claimed i.e. RM7,035,353.60 with interest at 8% per annum and costs.

In the application, the plaintiff also seeks to strike out the defence and counterclaim. The notes of proceedings before the Deputy Registrar were not made available to me. However, it was indicated that the counterclaim had been abandoned. This was only right. In proceedings by the Government for the recovery of any taxes, duties or penalties, a person is not entitled to avail himself or itself of any set-off or counterclaim. (See Rules of the High Court 1980 O. 73 r. 4(1) implementing s. 42(2)(e)(i) of the Government Proceedings Act 1956).

The plaintiff's application is supported by one Richard Foo Chi Ing's affidavit affirmed on 4 November 1992 while the defendant filed an affidavit in opposition made by one Chan Seng Chai.

The learned Deputy Registrar, after hearing the application, allowed summary judgment to be entered holding that the defendant had not raised any triable issue.

To begin with, it was raised on behalf of the defendant as a preliminary objection that the affidavit of Richard Foo Chi Ing affirmed on 4 November 1992 was improper in that it contained headings entitled "Reply And Defence To Counterclaim", "Reply" and "Defence To Counterclaim". I agree that the headings should not have been inserted. However, they are mere irregularities in form and do not affect the substance or contents of the application. It was not shown how the defendant had been prejudiced by them. The affidavit otherwise satisfies the essential requirements for purpose of application for summary judgment under O. 14. I fail to see how the application is in any way so affected by the irregularities that it should be struck out or why the affidavit should not be used.

On the substantive grounds of objection, firstly it was contended for the defendant that the plaintiff was estopped from claiming the sum RM5,461,730.88 in respect of the year of assessment 1986 because of the letter dated 20 June 1987 (Exh. CSC-2 annexed to Chan Seng Chai's affidavit). That letter was signed by an officer, one Saibun Salam of the Inland Revenue Department and addressed to M/s. Ho & Co., the auditor of the defendant company. It reads:

> Sarawak Properties Sdn. Bhd.
>
> Berasaskan kepada maklumat yang dikemukakan dalam Borang C Retan Cukai Pendapatan, pengiraan cukai dan akaun beraudit pelanggan tuan, pelanggan tuan tidak dikenakan cukai bagi tahun taksiran 1986.
>
> Kerugian yang dilaraskan dan elaun modal yang boleh dihantar ke hadapan ialah RM1,060,146 dan RM tiada masing-masing.

I would here divert slightly to point out that estoppel by reason of the letter Exh. CSC-2 has

not been specifically pleaded in the defendant's defence as should have been.

Now, on the substantive contention. In an action for recovery of tax due and payable, the court is precluded from entertaining any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4), (5) or (5A). (See s. 106(3) of the Act). It is not in dispute that respecting the assessment of the tax in this case, there has been an appeal to the Special Commissioners. However, neither party in this action has revealed what was the basis or reasoning for the assessment in respect of which the appeal to the Special Commissioners was lodged. There is virtually no material before me as to why and/or on what basis an assessment of the tax was made subsequent to the letter CSC-2. In the circumstance it is, in my view, not unreasonable to assume that by alleging estoppel the defendant is saying to the effect that the tax sought to be recovered is incorrectly assessed in that the defendant is not liable to tax or owing no tax at all. This I do not think the defendant can plead before the court in an action for recovery of tax under s. 106(1). The point should, if considered necessary, be raised in the appeal before the Special Commissioners. As observed in *Sun Man Tobacco Co. Ltd. v. Government of Malaysia* [1973] 2 MLJ 163 FC at 165:

> It is open to a taxpayer to go before them (meaning Special Commissioners of Income Tax) and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea ... It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts. (Per Gill FJ).

From the decision of the Special Commissioners either party may appeal on a question of law by requiring the Special Commissioners to state a case to the High Court (paragraph 34 of Schedule 5 to the Act).

In *IRC v. Pearlberg* [1953], 34 TC 57 CA, Mr. Pearlberg was served with notices stating that it was intended to proceed against him for the recovery of tax on certain properties, as having been the landlord thereof though not named in the assessments. In respect of other properties he was assessed to the tax as landlord. On an application for summary judgment in action for recovery of the tax, Mr. Pearlberg sought leave to defend on the ground that he was not in fact the landlord. It was held that issues on the merits should have been determined by appeal to the Commissioners and could not be raised in the proceedings for recovery.

Assuming I am wrong on the above view, it is my opinion that the plaintiff cannot be estopped by means of Exh. CSC-2. The principle that there is no estoppel as against the Crown on revenue matters is well established.

An estoppel against the Crown cannot be created by a taxing officer entering into an agreement purporting to conclude tax and related questions for future years, or offering any expression of opinion or adopting any course of action. In *Trustees of the Will of H.K. Brodie (deceased) v. Inland Revenue Commissioners* [1933], 17 TC 432, an expression of opinion that certain profits were not assessable was held not to create estoppel. Finlay J. said (at p. 441):

> ... but, in the second place ..., I do not think that it is any part of the duty of officials of the Inland Revenue to make contracts or to make declarations and I think it is impossible to hold that the Crown is, under these circumstances, bound by statements made by those officials, and that applies to statements made by the Special Commissioners or statement made by an Inspector of Taxes.

In *Gresham Life Assurance Society v. AG* [1916] 7 TC 36, an action for a declaration that the Crown was bound to adopt a certain basis of assessment following correspondence with the Surveyor of Taxes, it was held that any agreement to abide by a particular basis, if made, would be *ultra vires* the Surveyor and the Commissioners of Inland Revenue.

It cannot be doubted that the Director of Inland Revenue and his subordinate officers down to those charged with the due administration of the Act are holding public offices (s. 134 of the Act) and, in carrying out their tasks of assessing taxes under the Act, are performing public duties. As such, the doctrine of estoppel by record does not apply to them in that they cannot, by issuing a letter such as Exh. CSC-2, be estopped from subsequently exercising a power or discretion which it is their duty to exercise, though, as decided in *R v. Inland Revenue Commissioners; ex p. Preston* [1985] 2 AER 327, they are amenable to judicial review if they exceed or abuse their powers.

Learned Counsel for the defendant sought to distinguish *Brodie's Trustees*' case, *supra*, and some other cases cited for the plaintiff by alluding to the element of mistakes. We are dealing with legislative provisions relating to tax and revenue matters. In my opinion, the question of the applicability of estoppel against the Crown does not necessarily depend on the existence of any mistake on the part of revenue officers but rests on the broader basis as to whether the Crown is bound by representations and conduct of the officers of the Inland Revenue irrespective of the presence or otherwise of any mistake.

In *Liberty & Co. Ltd. v. The Commissioners of Inland Revenue* [1924] 12 TC 630, Rowlatt J. observed (at 639):

> ... it must be pointed out that the Commissioners of Inland Revenue have no power to bind the Crown by a general declaration of what the law is in particular circumstances beforehand. They make a statement for the information of those who like to act upon it in perfect faith and having great skill, and the parties to whom it is addressed may say "The Commissioners say this, it is probably right", and they are justified in acting upon it from that point of view in the same sense as they are justified in acting on the view of any person who advises them with knowledge to the best of his ability. But the Commissioners cannot bind the Crown.

I find the contention of the appellant unsustainable.

Next, for the appellant the question was posed as to whether the certificate dated 4 November 1992 (Exh. RF-7 annexed to Richard Foo Chi Ing's affidavit affirmed on 4 November 1992) was open to challenge. It was contended that the certificate was inconclusive. Reference was made to s. 142(2) of the Act where the words "until the contrary is proved" were used. And it was further submitted that because of Exh. CSC-2, the defendant had not discharged the burden of proof.

Exh. RF-7 is a certificate under the hand of the Director of Inland Revenue, Sarawak, pursuant to s. 142(1) of the Act. It certifies that the defendant had defaulted in the payment of RM7,035,353.60 (the amount claimed in the action under appeal), being the aggregate of taxes due and payable for the years of assessment 1986 and 1989 and the increases imposed for non-payment under s. 103(4).

Section 106(1) of the Act enacts that the tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Section 142(1) of the Act provides:

> In a suit under s. 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the amount.

Thus it is an evidential provision stating the effect of a certificate issued thereunder and enabling the Court to rely thereon to give judgment for the amount claimed.

In *Government of Malaysia v. DC* [1973] 1 MLJ 161 Chang Min Tat J. said (at 164):

> ... once an assessment is made, Revenue can invoke ss. 103 and 106 of the 1967 Act, the effect of such sections being that the tax payable under the assessment shall on the service of the notice of assessment on the person assessed be due and payable at the place specified in the notice, whether or not that person appeals against the assessment and such tax due and payable may be recovered by the Government by civil proceedings as a debt due to Government. Under s. 106(3), the court is debarred from entertaining any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5). By s. 106, the certificate of the Comptroller-General, including his deputy or assistant, is sufficient evidence of the amount of tax due and sufficient authority for the court to give judgment for that amount and for execution to be levied.
>
> If that is the law and if it is the duty of the courts established in the land to carry out and give effect to the law enacted by Parliament, then that is the end of the matter.

So far as is relevant, s. 142(2) of the Act provides:

> (2) In ... civil proceedings under this Act any statement purporting to be signed by the Director General or an authorised officer which forms part of or is annexed to the ... statement of claim, shall, until the contrary is proved, be evidence of any fact stated therein: ...

The question is: Does Exh. CSC-2 dated 20 June 1987 prove to the contrary of any of the matters stated in Exh. RF-7? This calls for a closer examination of the 2 documents.

As stated earlier, Exh. RF-7 dated 4 November 1992 is a certificate under the hand of the

Director of Inland Revenue to the effect that the defendant had made default in the payment of RM7,035,353.60 being taxes and increases (as particularised therein) imposed due and payable for the years of assessment 1986 and 1989. I have also referred to Exh. CSC-2 dated 20 June 1987. It spoke of non-chargeability to tax for year of assessment 1986 according to Income Tax Form C submitted, and the carrying forward of the adjusted loss. It made no specific mention at all of any of the matters raised in Exh. RF-7 e.g. the amount and the increases of the taxes due and payable therein stated and the default in the payment thereof. In the circumstance, the defendant, in my view, has not discharged the burden of proving to the contrary evidence of the abovementioned facts stated in Exh. RF-7. Exh. CSC-2, in my opinion, is no answer to the matters which are contained in Exh. RF-7 and which took place subsequent to Exh. CSC-2.

Under s. 106(3) of the Act, the Court is not to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4), (5) or (5A). As to the effect of s. 106(3), I would again refer to *Sun Man Tobacco Co. Ltd. v. Government of Malaysia* [1973] 2 MLJ 163 FC where Azmi LP said (at 164):

> In my opinion the learned Judge was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103 (4) or (5) he has to do so by way of appeal to the Special Commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any dispute on question of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated.

See also the judgment of Gill FJ in that case.

Having regard to the content of Exh. CSC-2, the submission for the defendant, and bearing in mind the provision of s. 106(3), Exh. CSC-2 in my view is insufficient to discharge the burden of displacing the statutory effect of the certificate Exh. RF-7.

The second contention of the defendant has no merit.

Lastly it was contended for the defendant that since the plaintiff had, for the years of assessment 1981 - 1985 (both inclusive), agreed to and accepted what was called "the completed contract" method of accounting adopted by the defendant respecting the same project and had assessed taxes on that basis, the plaintiff was estopped from changing to a new method (known as "percentage completion method") to assess the tax respecting the year of assessment 1986 in relation to the same project.

With respect I am unable to agree to the contention. The fact that the Revenue Department had accepted or adopted certain method in assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a different form of assessing. *Pethaperumal Chettiar v. C.I.T.* [1943] 1 TR 532, 538.

The doctrine of *res judicata* does not apply to the decisions of income tax commissioners. *Patuck v. Llyod (Inspector of Taxes)* [1944] 26 TC 284 at 292 CA.

In any event the contention is tantamount to disputing the correctness of the assessment. This is not justiciable under s. 106(3) of the Act in an action for recovery of tax brought under subsection (1) thereof. *Sun Man Tobacco Co. Ltd. v. Government of Malaysia, supra.* See also *Arumugam Pillai v. Government of Malaysia* [1975] 2 MLJ 29 FC.

The last ground also fails.

The appeal therefore is dismissed with costs to the plaintiff. The decision of the learned Deputy Registrar granting summary judgment to the plaintiff is to stand.

At the hearing of the appeal, Counsel for the appellant/defendant urged that in the event of the appeal being dismissed, stay of execution of the judgment be granted. As I had indicated, I am not prepared to consider the matter at this stage. The appellant/defendant may apply giving reasons, if it so wishes.